

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000190-001 DT

03/08/2006

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
L. Rasmussen
Deputy

FILED: 03/10/2006

FRANK KELTON

FRANK KELTON
2144 E VAUGHN AVE
GILBERT AZ 85234

v.

ISRAEL G TORRES (001)
ARIZONA STATE REGISTRAR OF
CONTRACTORS (001)
MELVIN T NOESGES JR. (001)

MONTGOMERY LEE
MELVIN T NOESGES JR.
20704 N 90TH PLACE #1070
SCOTTSDALE AZ 85255

AZ REGISTRAR OF CONTRACTORS
OFFICE OF ADMINISTRATIVE
HEARINGS

RULING

On March 18, 2005, plaintiff Frank Kelton (hereafter, "plaintiff" or "Kelton") filed a Complaint for Judicial Review of Administrative Decision with this court. The named defendants are the Registrar of Contractors (hereafter, "ROC"), Israel Torres (the former director of the ROC), and Melvin Noesges, dba Specialty Concrete Construction (hereafter, "defendant" or "Noesges"). Kelton appeals from a final decision of the ROC regarding a complaint he filed against Noesges. The ROC has participated only as a nominal party in these proceedings.

Judicial review has been more difficult and time-consuming than normal due to the barrage of motions and often ill-defined filings not contemplated or authorized by the Administrative Review Act (A.R.S. §§ 12-901, *et seq.*) or the Rules of Procedure for Judicial Review of Administrative Decisions. What should have been a simple, straight-forward appeal regarding the penalty imposed by the ROC devolved into a procedural and substantive morass. Each time the case appeared ripe for review, a new filing would appear, and another wave of briefing would ensue. A request for consolidation with a newer cause number (LC 2005-

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000919) further delayed these proceedings while the court got up to speed on both matters.¹ After reviewing the claims, allegations, and procedural posture in both files,

IT IS ORDERED denying the requested consolidation with LC 2005-000919.

IT IS FURTHER ORDERED denying plaintiff's Motion for Leave to Introduce Additional Evidence. Judicial review of administrative decisions is limited. In *Shaffer v. Arizona State Liquor Board*, 197 Ariz. 405, 4 P.3d 460 (App. 2000), the court explained the relatively narrow application of A.R.S. § 12-910(A):

The court . . . defers to the administrative decision if substantial evidence supports it. If, on the other hand, the court concludes that the new or additional evidence is such that, had it been introduced in the administrative proceedings, no reasonable fact finder would have reached the administrative decision, then the latter is not supported by substantial evidence.

197 Ariz. 405, 409, 4 P.3d 460, 464.

Shaffer holds that it is the "unusual" case that will warrant the introduction of new evidence in the superior court:

[W]e conclude that the legislature did not intend to make the superior court an independent trier of fact and that the statute offers a safety net **for the unusual case** in which new evidence, had it been presented in the administrative proceeding, would have changed the decision. [emphasis added]

197 Ariz. 405, 409, 4 P.3d 460, 464.

IT IS FURTHER ORDERED denying plaintiff's request for findings of fact and conclusions of law.

IT IS FURTHER ORDERED denying Noesges' "Motion to Compel This Court to Order Documents From the SSA Regarding a Known Used Social Security Number by Plaintiff."

IT IS FURTHER ORDERED denying plaintiff's "Motion for: 1. Sanctions for Deliberate Misconduct; and 2. An Order from this Court."

Turning to the substantive merits of this appeal, it is appropriate to recognize at the outset the limited role of this court. A.R.S. § 12-910(E) states:

¹ Kelton only recently filed an Answer in those proceedings. He is a defendant in that matter, and Noesges is the plaintiff.

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The court may affirm, reverse, modify or vacate and remand the agency action. **The court shall affirm the agency action unless** after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing **the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.** [emphasis added]

In determining the propriety of an administrative agency's final decision, the court reviews the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Petrus v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), *quoting Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). The appellate court views the evidence in the light most favorable to upholding the agency's decision and will affirm if the decision is supported by any reasonable interpretation of the record. *See Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998). The court does not function as a "super agency" and may not substitute its own judgment for that of the agency where factual questions and agency expertise are involved. *See DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984).

The underlying dispute between these parties arose out of construction work (patio and wall) that Noesges performed at Kelton's residence. Kelton filed a complaint with the ROC. An evidentiary hearing began on February 17, 2004 before Administrative Law Judge ("ALJ") Michael Barth. Further hearings days occurred on August 5, 2004, August 25, 2004, and September 13, 2004. The ALJ issued detailed findings of fact and conclusions of law. Among his factual findings were the following:

- Construction of the wall, masonry work, and application of stucco exceeded the scope of Noesges' contracting license. (Finding of fact no. 8)
- Defendant held himself out as licensed and competent to perform concrete work, stucco, and masonry work. (Finding of fact no. 11)
- Contrary to the contract specifications, Noesges failed to pour a separate footing to support the wall. (Finding of fact nos. 18, 19)
- The wall in question did not violate any Town of Gilbert building codes. (Finding of fact no. 21)

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- No competent evidence established that defendant's concrete, masonry, or stucco workmanship (original or corrective) fell below minimum workmanship standards. (Finding of fact nos. 25-27)
- By failing to construct the wall footing as specified in the parties' contract, Noesges failed to perform the project in a professional and workmanlike manner and thereby caused Kelton substantial injury. (Finding of fact no. 29)
- Noesges knowingly contracted beyond the scope of his license. (Finding of fact no. 30)
- Noesges' advertisements for his services were misleading. (Finding of fact no. 31)

The ALJ's Conclusions of Law include the following:

- Having departed from the contract specifications in constructing the wall footing, Noesges violated A.R.S. § 32-1154(A)(2). (Conclusion of law no. 1)
- Having departed from the contract specifications in constructing the wall footing, Noesges failed to perform that work in a workmanlike and professional manner, in violation of A.A.C. R4-9-108, and in turn, in violation of A.R.S. § 32-1154(A)(3), which requires licensed contractors to comply with any rules adopted by the ROC. (Conclusion of law no. 2)
- Having departed from the contract specifications in constructing the wall footing, Noesges committed a wrongful act, causing Kelton substantial injury in violation of A.R.S. § 32-1154(A)(7). (Conclusion of law no. 3)
- Having engaged in misleading advertising whereby a member of the public "may" have been injured, Noesges violated A.R.S. § 32-1154(A)(16). (Conclusion of law no. 4)
- Noesges knowingly contracted to perform stucco and masonry work beyond the scope of his license, in violation of A.R.S. § 32-1154(A)(17).

The ALJ recommended that Noesges' Class C-09 license be suspended until the ROC received proof that he had either: (1) replaced the current wall footing with a separate footing of certain specifications (including replacing/repairing any damage to the wall occasioned by such work); or (2) entered into "other mutually acceptable arrangements to resolve the foregoing dispute with Complainant." The Registrar adopted the ALJ's findings, conclusions, and recommendation with only one minor modification not at issue in these appellate proceedings. Kelton's subsequent request for reconsideration/rehearing was denied.

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The very narrow issue raised by Kelton in this judicial review proceeding is whether the ROC's sanction was inappropriate.² He argues that the "penalty does not fit the crime." *Opening Brief*, p. 3. There are, however, no minimum or presumptive penalties for the violations found by the ROC. Kelton's reliance on A.R.S. § 32-1164 is misplaced. It is true that a person may be criminally prosecuted for contracting without a license. In such a criminal prosecution, certain mandatory sanctions attach upon conviction. Those mandatory sanctions, however, are inapplicable to the administrative proceedings at issue in the instant case. A criminal case is initiated by a prosecutor and entails different procedures and standards of proof. This is not a criminal case.

Administrative agencies have broad discretion in fashioning penalties or sanctions. This is especially true when an agency has a specialized area of expertise, such as the ROC. An agency that has conducted an evidentiary hearing is in a far superior position to evaluate the parties and devise an appropriate remedy in a given case than a Superior Court judge reading a cold record. A judge may not substitute his or her judgment for the agency's as long as the penalty imposed is neither illegal nor completely arbitrary. An abuse of discretion is characterized by arbitrariness or capriciousness and a failure to conduct an adequate investigation into the facts relevant to sentencing. *See State v. Chavez*, 143 Ariz. 281, 693 P.2d 936 (App. 1984).

It is clear that the ALJ gave careful and thoughtful consideration to this case and to the parties' respective positions. He cut through the conflicting claims and irrelevant information and came to a reasoned, well-articulated conclusion. Even if this court would have imposed a different sanction, "where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Petrus v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), *quoting Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972).

On the record before it, this court cannot label the ROC's decision contrary to law, arbitrary, capricious, or an abuse of discretion.

IT IS ORDERED denying plaintiff's request for relief.

IT IS FURTHER ORDERED denying any and all pending motions filed under this cause number that have not been specifically addressed herein.

/s/ Margaret H. Downie

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² The overwhelming majority of the issues addressed in Noesges' answering brief are irrelevant to the narrow issue framed by Kelton's appeal and will not be addressed in this proceeding.